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No. • •

Supreme Court, U.S.
FILED
JUN 5, 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

KATHY M. MASON
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the provisions of Article 52(a)(2) of the Uniform Code of Military Justice Violate the Due Process Clause of the Fifth Amendment by Failing To Provide for a Unanimous Verdict from a Six Member Court?

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

KATHY M. MASON
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Kathy M. Mason respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ____ M.J. ____ (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 448517 (ACMR 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987, affirming petitioner's conviction dated January 17, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person . . . shall be deprived of liberty or property, without due process of law."

The Uniform Code of Military Justice (hereinafter cited as UCMJ), 18 U.S.C. 801 et. seq. (1984) provides:

> Article 52(a)(2): No person may be convicted of any [offense other than one for which the death penalty is mandatory], except as provided in section 845(b) of this title (Article 45(b) [pursuant to a plea of guilty] or by the concurrence of two-thirds of the members present at the time the vote is taken:

STATEMENT OF THE CASE

Contrary to her pleas, petitioner was found guilty of assaulting a child under sixteen years of age and false swearing, in violation of Articles 128 and 134, UCMJ. She was sentenced to a bad-conduct discharge, confinement for five years and forfeiture of all pay and allowances.[1]

In a pretrial motion, defense counsel moved for the military judge to require a unanimous verdict on findings in petitioner's case (R. 12 and Appellate Exhibit II). The military judge denied the motion (R. 12). After extensive *voir dire*, the military judge sustained challenges against three of the nine court members, leaving six members to decide petitioner's case (R. 91). The court-martial was composed of officer and enlisted members.[2] The constitutional question involved was litigated at trial and at every stage of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

WHETHER THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY FAILING TO PROVIDE FOR A UNANIMOUS VERDICT OF GUILTY FROM A SIX MEMBER COURT.

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[1] The sentence was approved by the convening authority pursuant to Article 60, UCMJ.

[2] Court-martial members function much the same as a civilian jury. They must render a verdict based on the facts presented and the military judge's instructions. Petitioner's case was a general court-martial and therefore required at least five members. Two-thirds of the members must concur in order to arrive at a verdict of guilty. *See* Articles 16, 25, 51 and 52, UCMJ.

REASONS FOR GRANTING THE WRIT

The men and women who serve in the armed forces are entitled to the same due process that is provided civilians unless there is clear evidence that such process would detract from the military's ability to perform its mission. The Court has found a constitutional requirement that six member jury verdicts be unanimous. In order for the American public to maintain confidence in the military justice system it must conform as much as practically possible to constitutional notions of due process. This is especially true in light of the Court of Military Appeals' recent holdings expanding military court-martial jurisdiction.[3] Because courts-martial are not limited to trying military crimes, they should be required to accord the same degree of due process as do other criminal courts when practicable. Petitioner realizes that the military's special mission prevents the use at courts-martial of the identical procedures the federal criminal courts employ.[4] Petitioner submits however, that the government has failed to demonstrate any compelling reasons justifying a less than unanimous verdict from a six member court-martial panel.

I

PETITIONER HAS STANDING TO CLAIM THAT THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ, VIOLATE HER DUE PROCESS RIGHTS.

Article 51(a), UCMJ, requires that the members of a court-martial vote on findings by secret written ballot. The votes are counted by the junior member and checked by the president, who is the senior member. Article 52(a)(2), UCMJ, requires that two-thirds of the members concur in order to render a guilty verdict. *See also Manual for Courts-Martial,*

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[3] *See* United States v. Solorio, 21 M.J. 251 (CMA) *cert. granted* 106 S.Ct 2914 (1986) and United States v. Abell, 23 M.J. 99 (CMA) *cert. petition filed,* 55 USLW 3453 (U.S. Dec. 10, 1986) and cases cited therein.

[4] *See e.g.* Mil.R.Evid. 101 (b)(1) (the rules of evidence generally applied in federal criminal courts will apply at courts-martial unless they conflict with specific provisions of military law).

United States, 1984, Rule for Courts-Martial [hereinafter cited as R.C.M.] 921. "Except as provided in Mil.R.Evid. [Military Rule of Evidence] 606, members may not be questioned about their deliberations and voting." R.C.M. 922(e). Thus, polling the court-martial members is prohibited. As a result, petitioner does not and can not ascertain the numerical composition of the verdict.

The Article and Rule requiring a secret ballot, in effect, insulate Article 52(a)(2), UCMJ, from due process scrutiny. Petitioner submits that the secret ballot provisions were not so intended. Rather, they were intended to shield the court-martial members from unlawful command influence. Congress has long been concerned that court-martial members may be subject to unlawful command influence. *See* Hearings on H.R. 2498 before a Subcommittee of the Committee on Armed Services, 81st Cong. 1st Sess. 628, 640-641, 825-26, and 1075 (1949) and *see also* Report of War Department Advisory Committee on Military Justice, 6-7 (1946) (committee investigated commanders' control of courts-martial during Second World War and concluded that it was necessary to limit commanders' influence of courts-martial members). Legislation designed to protect court-martial members from unlawful command control should not also serve to deny petitioner an opportunity to litigate a question of fundamental due process.

Petitioner's inability to present the numerical composition of the verdict should not result in a lack of standing before the Court. Petitioner asks the Court to presume that petitioner's verdict was less than unanimous and that petitioner suffered prejudice. *Cf. Mendrano v. Smith*, 797 F.2d 1538, 1540 n.1 (10th Cir. 1986) ("Since, as required by the Uniform Code of Military Justice the court-martial voted by secret ballot, our record does not reveal the number of votes for conviction. However, we consider the two-thirds rule's validity because it did apply to this trial and assume only two-thirds, or four members of the court-martial voted for conviction").

II

THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY FAILING TO PROVIDE A UNANIMOUS VERDICT FROM A SIX MEMBER COURT.

A. *Minimum Due Process Requires At Least A Unanimous Six Member Verdict.*

The Due Process Clause requires a unanimous verdict of a six member fact-finding body in any non-petty criminal prosecution. In *Burch v. Louisiana*, 441 U.S. 130, (1979), the Court held that a less than unanimous verdict from a six member jury was unfair and unconstitutional. *Citing, Ballew v. Georgia*, 435 U.S. 223 (1978) (five member jury is unconstitutional *per se*). In *Ballew*, the Court stressed that at "some point, [the] decline in jury size leads to inaccurate fact-finding and the incorrect application of the common sense of the community to the facts." *Ballew*, 435 U.S. at 232. Accordingly, convictions where unanimity is not required of fact-finding bodies composed of fewer than six members are unfair and violate due process.

In *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) the Court stated, "[t]he State's interest in prevailing at trial-unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."[5] The same compelling interest in ensuring accurate findings of fact applies to the parties in courts-martial.

B. *Due Process In The Military Context Does Not Justify Less Than A Unanimous Six Member Verdict.*

The Due Process Clause is applicable to the military. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953); *United States v. Tempia*, 16 CMA 629, 37 CMR 249 (1967). This requirement may be modified only when special military conditions justify a dif-

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[5] *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (Due Process Clause requires that tribunals foster accurate fact-finding); In re Murchison, 349 U.S. 133 (1955) (a fair trial in a fair tribunal is a basic requirement of due process).

ferent rule than that applied under civilian law. *Kauffman v. Secretary of Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Courtney v. Williams*, 1 M.J. 267, 270 (CMA 1976). The government has failed to reconcile its use of the traditional nonunanimous verdict at court-martial[6] with current due process standards.

Current congressional intent is to conform the military justice system to civilian notions of due process and fairness whenever such conformity would not detract from the military's mission. *See generally* Military Justice Act of 1983, Pub.L.No. 98-209, 97 Stat. 1393; Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat.; *cf. United States v. Remai*, 19 M.J. 229, 233 (CMA 1985) ("[T]he recent enactment of legislation which for the first time subjects courts-martial to direct review by the Supreme Court tends to suggest a congressional intent that the same standards should be applied in the review of a court-martial conviction that would be employed in the review of a civil-court conviction." (footnote omitted)).

Congress has retained enough court-martial provisions[7] designed to support the military in accomplishing its mission

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[6] No special military conditions exist to justify a less than unanimous verdict from a six member court. Article 52 and the other articles of the UCMJ were substantially derived from the Articles of War, August 29, 1874 (39 Stat. 650). Hearings on H.R. 2498, *supra* at 1082. The American Articles of War were substantially derived from the British Articles of War. Winthrop, Military Law and Precedents, (1886) 46-60. The British articles evolved separately from common law and placed primary emphasis on maintaining military discipline as opposed to providing due process. *Id.* at 52-54. The American Articles of War provided that a verdict must reflect the concurrence of a majority of the members in noncapital cases. Articles of War, Article 43. Colonel Winthrop indicates that a majority verdict evolved from the delegation of a sovereign or commander's authority to a board of trusted officers to decide a soldier's criminal culpability. Winthrop at 62-63. The board would report their findings to the sovereign or commander for his approval, modification and implementation in accordance with traditional military decision making procedures. *Id.* at 63. Consequently, courts-martial have traditionally served as an advisory body to the commander, supporting the military commander's need for swift discipline.

[7] Some of these provisions are as follows:

1. Court members are senior in rank to the accused and in practice often consist of commanders and senior enlisted persons Article 25, UCMJ.

2. Court members are selected personally by the convening au-

to negate any perceived need for less than a unanimous verdict. In fact, because morale is a vital element in maintaining discipline, and dependent upon the belief by soldiers that they are being treated "fairly", the nonunanimous verdict may cause lower morale and detract from the military's ability to perform its mission.

The argument that a unanimous verdict from a court consisting of six members will require more deliberation time and may result in "hung juries," thereby slowing the court-martial process, was rejected in *United States v. Burch*:

> Undoubtedly, the state has a substantial interest in reducing the time and expense associated with the administration of its system of criminal justice. But that interest cannot prevail here. First, on this record, any benefits that might have accrued by allowing five members of a six person jury to render a verdict, as compared with requiring unanimity of a six member jury, are speculative at best. More importantly, we think that

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thority who exercises command over them and to whom the court members must look for career advancement. Article 25(d)(2), UCMJ.

3. The convening authority utilizes the criteria in Article 25(d)(2), UCMJ, and selects only those persons, who, in his discretion, are best qualified to serve as court members by reason of age, education, training, length of service and judicial temperament.

4. The trial judges and first level of appellate judges are career military officer/lawyers who are not afforded Article III, Constitution, protections with respect to salary and tenure, yet decide issues involving the constitutionality of Congressional acts as they relate to federal criminal proceedings. *See* Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J., 1984.

5. Military courts when composed of officers are college-educated, and stand as a virtual blue ribbon fact-finding body, in stark contrast to the usual composition of civilian juries.

6. The convening authority wields enormous discretionary power within the military justice system, which includes, but is not limited to, the decision to refer a case to court-martial, production of witnesses, acts of clemency, and disapproval of the findings and/or sentence for any reason at all. Articles 22, 25, 53, and 60, UCMJ.

7. The members can ask questions of the witnesses. Mil.R.Evid. 614.

8. Both the prosecution and defense are afforded only one peremptory challenge even in capital cases. Articles 41, UCMJ.

> when a state has reduced the size of its juries to the minimum number of jurors permitted by the constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the state should yield.

441 U.S. at 139.

C. *All Judicial Fact-Finding Bodies, Regardless Of Their Legal Origin, Must Conform To Constitutional Standards.*

Fact-finding bodies have been recognized as important barriers against governmental oppression. *Singer v. United States*, 380 U.S. 24 (1965). They provide an essential safeguard against overzealous prosecutors and a biased or unfair judge. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Because Congress has guaranteed soldiers the right to a trial with a fact-finding body pursuant to Article 16, UCMJ, those procedures must be fair and in accordance with due process and Constitutional standards. *See McKeiver v. Pennsylvania*, 403 U.S. at 543.

Petitioner is cognizant of recent military court decisions rejecting the proposition that unanimous verdicts are required in the military. *United States v. Neely*, 21 M.J. 606 (AFCMR 1985), *United States v. Seivers*, 9 M.J. 612 (ACMR 1980), *United States v. Guilford*, 8 M.J. 598 (ACMR 1979) *pet. denied* 8 M.J. 242 (CMA 1980) and *United States v. Corl*, 6 M.J. 914, *aff'd on other grounds* 8 M.J. 47 (CMA 1979). Nevertheless, petitioner submits the instant case requires consideration for the following reasons. First, the facts of petitioner's case are extremely similar to those in *Burch v. Louisiana*, and therefore demand judicial reconciliation.

Secondly, Congress' recent decision to place military tribunals directly under Supreme Court scrutiny[8] is a clear signal that Congress intends military courts to parallel civilian courts unless military necessity dictates to the contrary.[9] *See also Kauffman v. Secretary of the Air Force*, 415

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[8] Military Justice Act of 1983, *supra*.

[9] United States v. Remai, 19 M.J. 229, 233 (CMA 1985).

F.2d 991, (courts-martial may only vary from civilian standards of due process because of special military conditions).

Lastly, the implication of the holdings of *Corl* and *Guilford* is that a two-thirds majority verdict from a five member military court is equal to, in terms of due process, the six member unanimous civilian verdict required by *Ballew* and *Burch*. The Courts of Military Review justify such speculation by the fact that military courts are "blue ribbon" fact-finders. *Corl*, 6 M.J. at 915 and *Guilford*, 8 M.J. at 602. The logic is questionable at best. If military fact-finders possess greater fact-finding expertise than civilian jurors, then anything less than a unanimous verdict must be considered suspect. The logic of *Corl* and *Guilford* dictates that the opinion of one dissenting "blue ribbon" military fact-finder must be given *more credence* than the dissenting opinion of one civilian venireman who was chosen "without reference to qualifying standards." *Corl*, 6 M.J. at 916.

D. *Statistical Studies And Data Considered By The Court In Burch and Ballew Must Not Be Summarily Dismissed Without Justification In The Military Context.*

In *Ballew* the Court considered volumes of data indicating that small juries are less likely to foster effective group deliberations, are more likely to render inconsistent verdicts, create minorities of one of two people who become less likely to follow their convictions because of peer pressure, and lessen meaningful "community" participation during the deliberation process. *Id.* 435 U.S. at 232-237. The data convinced the Court that the Constitution requires a six-member unanimous jury verdict in a non-petty offense. *Burch*, 435 U.S. at 138, *citing Ballew*. There exists no military exigency that justifies military courts' refusal to consider and follow the same data. Indeed, one of the primary experts in the field of juries and small group interactions relied on by the Court in *Burch* and *Ballew* stated, regarding military panels/juries that, "the same principles [of group decision making] would apply to the military as to civilian decision makers," and "[in] other areas of research, only negligible or no differences have

been found between civilian and military populations." Saks, Michael, J., Department of Psychology, Boston College, Letter to Captain Richard J. Anderson, Defense Appellate Division, U.S. Army Legal Services Agency (Appendix C).

III

IN LIGHT OF THE COURT OF MILITARY APPEALS' RECENT DECISIONS EXPANDING COURT-MARTIAL JURISDICTION, COURTS-MARTIAL MUST PROVIDE MINIMUM DUE PROCESS.

In the last decade, the United States Court of Military Appeals has expanded court-martial jurisdiction over many offenses which had previously been tried in civilian courts. *Compare United States v. Solorio*, 21 M.J. 251 (CMA) *cert. granted* 106 S.Ct. 2914 (1986)[10] (military jurisdiction found over off-post sex offenses against daughters of fellow servicemen) with *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969) (court found no military jurisdiction over off-post sex offenses against a daughter of a fellow serviceman).

The traditional justification for the military's streamlined criminal justice system was that its primary purpose was to preserve military discipline and that it would only be used to prosecute military crimes that were "service connected." *O'Callahan v. Parker*, 395 U.S. 258 (1969). While the *O'Callahan* Court acknowledged that specialized military courts were necessary, it concluded that since these courts necessarily denied certain fundamental constitutional rights they must be limited in scope to "*the least possible power adequate to be end proposed.*" *Id.* at 265, *quoting Toth v. Quarles*, 350 U.S. 11, 23 (1955), *quoting Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231 (1821) (emphasis supplied by *Toth* Court). In light of the expanded scope of court-martial jurisdiction it is imperative that the fundamental constitutional rights of the military accused be staunchly protected.

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[10] *See also* United States v. Abell, 23 M.J. 99 (CMA) *cert. petition filed* 55 USLW 3453 (U.S. Dec. 10, 1986) (No. 86-953), United States v. Lockwood, 15 M.J. 1 (CMA 1983) and United States v. Trottier, 9 M.J. 337 (CMA 1980).

The military's mission of defending this country is clearly a compelling state interest. Petitioner's interest in receiving a fair trial resulting in accurate findings of fact is also compelling. *Cf. Ake v. Oklahoma*, 470 U.S. 79. There has been no showing that compliance with the basic due process rights expressed in *Burch* will in anyway be deleterious to the national defense. The perception of fairness and accurate verdicts can only enhance the morale and effectiveness of men and women in our armed forces. Thus, the two interests are neither inconsistent, nor mutually exclusive and can coexist to promote an effective fighting force and maintain the constitutional rights of its soldiers.

Conclusion

Anything less than a minimum requirement for a unanimous six member verdict clearly thwarts constitutional due process provided accused in military trials. Soldiers, in the absence of a clear showing that a compelling national interest requires otherwise, are entitled to the same accuracy from fact-finders in criminal trials as are all other United States citizens.

Respectfully submitted,

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APPENDICIES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 56524/AR
CMR Dkt. No. 448517

UNITED STATES, APPELLEE,

v.

KATHY M. MASON (147-60-4515), APPELLANT.

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it appears that appellant's court-martial was properly constituted and its verdict rendered in accordance with Articles 1-134, Uniform Code of Military Justice, 10 U.S.C. §§ 801-934, respectively. Accordingly, it is by the Court this 8th day of April, 1987,

ORDERED:

That said petition is granted on the issue raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.*

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

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* *See Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986).

COX, Judge (dissenting):

I believe the issue raised in the petition is without merit. Accordingly, I dissent from granting it. If it may have any merit, then we should grant, require briefs, and have oral argument before deciding the issue.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (HANCOCK)
Appellate Government Counsel (HERRINGTON)

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

CM 448517
3d Armored Division

UNITED STATES, APPELLEE,

v.

PRIVATE E1 KATHY M. MASON, 147-60-4515,
UNITED STATES ARMY, APPELLANT

Before DeFORD, WILLIAMS, and KENNETT Appellate Military Judges

J. P. Hug, Military Judge

15 October 1986

For Appellant: Major Stephen R. Dooley, JAGC, Major Joel D. Miller, JAGC, Captain Scott A. Hancock, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary, F. Roberson, JAGC, Major Robert L. Swann, JAGC, Captain Thomas L. Herrington, JAGC (on brief).

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ WILLIAM G. STOKES
William G. Stokes
Captain, JAGC
Chief Deputy Clerk of Court

APPENDIX C

From: Michael J. Saks, Ph.D., Department of Psychology, Boston College, Chestnut Hill, Massachusetts 02167

To: Captain Richard J. Anderson, Defense Appellate Division, U.S. Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041

Subj: Size of judicial decision-making body in military trials

Ref:
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(f) Saks, M.J., and Hastie, R., Social Psychology in Court. New York: Van Nostrand Reinhold (1978).
(g) Stouffer et al., *The American Soldier.* (Part of series, Studies in social psychology in World War II). Princeton, N.J.: Princeton University Press (1949).
(h) Zeisel, H., ". . . And then there were none:" The Diminution of the Federal Jury. 38 *U.Ch.L.Rev* 710-724 (1971).
(i) Figure 1 (attached).

1. As I understand the issue, it is that the research findings on group decision-making as a function of group size which were adverted to by the U.S. Supreme Court in *Ballew*

v. Georgia are thought by some not to apply to military populations. To my knowledge, none of the studies that have been conducted on the question employed military populations. I think, however, that in the absence of such direct studies, the most defensible conclusion is that the same principles would apply to military as to civilian decision-makers. In the paragraphs below I present the general rationale and evidence that lead me to believe this. Let me apologize in advance for any misstatements I might make regarding particulars of procedures in military courts, with which I am unfamiliar. My expertise goes only to the effects of size on group behavior.

a. In the 1940's and 50's a substantial portion of social psychological research on small group behavior was done in, by and for the military. Summaries of much of this work may be found in Hare (1976), McGrath and Altman (1966), and the famous series by Stouffer et al. (1949) on *The American Soldier*. Virtually all of the social psychological phenomena observed among civilians – including principles of attitude change, group influence, leadership, and decision-making – were found to hold among military personnel as well. In particular, it has been repeatedly found, contrary to popular belief, that the composition of a group (that is, the age, education, and other demographic characteristics of group members) bear little or, usually, no relation to the performance of the group's task (e.g., McGrath and Altman, 1966, p. 106-107; Havron et al., 1952; Saks, 1976; Saks and Hastie, 1978). (What can make a difference are specific technical skills required by the task; in the jury situation this is rarely a problem).

b. Most of the variables of interest to the Court in *Ballew* are especially unlikely to behave differently with the use of different populations. Some are strictly statistical phenomena, where it matters not whether the group members are military, civilian, or even whether they are people. That is, the ability of groups of varying sizes to provide cross-sectional representation of the community from which they are drawn depends only upon the distribution of objects (people, marbles, cars, anything) in the population and the

size of the sample. Similarly, one of the major virtues of a group over individuals is its ability to bring together diverse intellectual and experiential resources. That ability grows with the group's size (although with each additional member each incremental improvement is less than the one that preceded it). Further, there is no obvious reason to think that if larger groups lend themselves to greater resistance of group members to conformity pressures by the majority or promote group deliberation, the population from which the group is drawn will alter these general phenomena (see Zeisel, 1971; Saks, 1977).

c. To say simply that one population is different from another and therefore the findings from one do not generalize to the other is a misleading oversimplification. If a functional relationship is found among population A between size and, say rate of conviction, even a finding that population B convicts at a different rate than population A does not negate the functional relationship. Only "interactions" of particular sorts could do that. This is illustrated in Figure 1a, where the two different populations show a difference in conviction rates, but their pattern of response to jury size changes is the same. The suggestion that the findings from one population do not apply to another really implies the relationships shown in Figures 1b and 1c. Here, the relation between size and convictions found in population A either does not hold for population B or is reversed. Without evidence we cannot be certain, but that such a "statistical interaction" obtains in the switch from civilian to military populations seems highly unlikely.

d. In trying to think of some differences that may exist among military populations that could produce such differences, two possibilities occur to me. One is the hierarchical relationship that exists among military personnel. The second is the existence of a likelihood of future interaction among "jury" members. It may be, for example, that due to the influence of higher ranking members, other members of the decision-making body play no independent role, and in essence rubber stamp the preference of the highest authority. I have no way of knowing if this is the case, but it

would make the size of the body far less important. This difference is not one of demographics of the military population, but the social structure within which they operate. The suggestion in this paragraph is highly speculative. The point of making it is chiefly to indicate that those who think the difference in populations makes a difference ought to specify just what they believe to be the critical element(s), and offer evidence that take us beyond speculation.

2. In summary, while I am aware of no direct tests of the question at hand that have been conducted on military populations, it is highly unlikely that that would be a difference that makes any difference. The steps of inference in reaching this conclusion are small ones. In other areas of research, only negligible or no differences have been found between civilian and military populations. There is no apparent reason why the same should not be true in regard to the variable of group size. Moreover, some of the phenomena adverted to in *Ballew* are statistical and have nothing to do with the social characteristics of the population from which a jury is drawn.

Sincerely yours,

/s/ DR. MICHAEL I. SAKS, PH.D.

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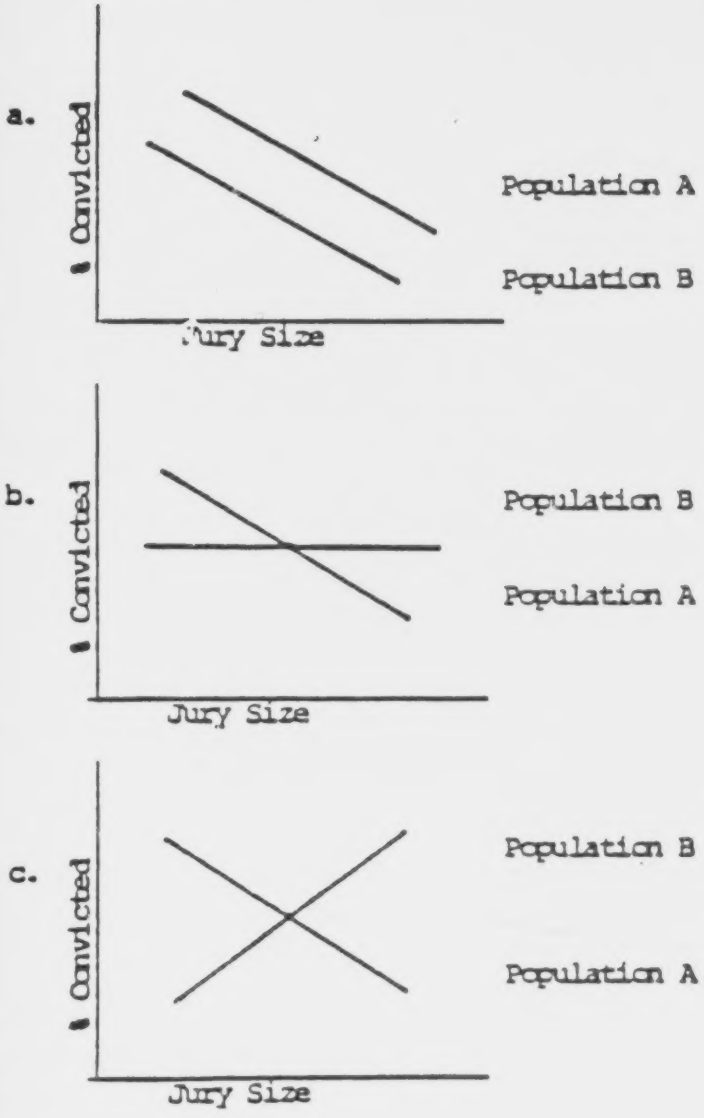
FIGURE 1. Possible relationships between jury size and conviction rates in two different populations.



U.S. GOVERNMENT PRINTING OFFICE: 1987 — 184-207/42014

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1935

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHY M. MASON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), violates the Constitution by permitting a defendant to be convicted by the two-thirds vote of a six-member court-martial panel.

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In the Supreme Court of the United States

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No. 86-1935

KATHY M. MASON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 127. The opinion of the Army Court of Military Review (Pet. App. 3a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987. The petition for a writ of certiorari was filed on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial in January 1986. She was convicted of assaulting a child under the age of 16 and of false swearing, in violation of Articles 128 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 928 and 934. Petitioner was sentenced to five years' confinement, to forfeiture of all pay, and to a bad conduct discharge. The convening authority reviewed the case and approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. Petitioner was convicted of deliberately causing second degree burns to the feet and perineum of her 20-month old daughter by holding the child in a tub of hot water. She was also convicted of making false statements under oath to an agent of the Army Criminal Investigation Command by telling the agent that her daughter's burns resulted when petitioner accidentally dropped a pan of boiling water after tripping over her daughter.

2. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. (Supp. IV) 816(1)(A), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-

martial convening authority[1] to select as court-martial panel members "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament."[2] Article 25(c)(1) of the Code, 10 U.S.C. (Supp. IV) 825(c)(1), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides for a two-thirds majority vote of the panel members for conviction of all crimes not carrying a mandatory death sentence. On sentencing, a two-thirds majority vote is necessary for a sentence of imprisonment less than ten years, a three-fourths majority is required for sentences of

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[1] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984 (Manual)*. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34, 60, UMCJ, 10 U.S.C. (& Supp. IV) 825, 834, 860; see also Rules 503, 601, 1107, *Manual*.

[2] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. (& Supp. IV) 825, 829.

ten years' incarceration or more, and a unanimous vote is necessary to impose the death penalty.[3] The military justice system also does not provide for a retrial in the event that the panel is unable to agree by the necessary majority. When that occurs, the defendant is automatically acquitted. Rule 921(c)(3), *Manual for Courts-Martial, United States—1984*.

3. Petitioner's court-martial was convened at Frankfurt, Germany, by the Commander of the Third Armored Division. When the court-martial convened on January 16, 1986, nine soldiers were detailed to serve as panel members (Tr. 67). Following voir dire, the trial judge granted two defense challenges for cause, and the defense peremptorily challenged a third member, which left the number of members at six (Tr. 91, 117-120). The defense sought to have the trial judge instruct the panel that it must be unanimous to convict petitioner of any charged offense (Tr. 12; AX 2). The trial judge denied the motion (Tr. 13).

ARGUMENT

Relying on *Burch* v. *Louisiana*, 441 U.S. 130 (1979), which held that the Sixth and Fourteenth Amendments require verdicts by six-person juries in serious state criminal cases to be unanimous, petitioner contends that her conviction by a potentially nonunanimous court-martial panel violates the Due Process Clause of the Fifth Amendment.[4] That con-

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[3] See *Mendrano* v. *Smith*, 797 F.2d 1538, 1540-1541 (10th Cir. 1986); *United States* v. *Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957).

[4] The Uniform Code of Military Justice does not provide any method of discovering the actual vote of the panel

tention does not warrant review by this Court, for several reasons.[5]

1. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Burch* v. *Louisiana*, *supra*, because a service-member may be convicted by a two-thirds vote of the court-martial panel. *United States* v. *Neeley*, 21 M.J. 606, 609 (A.F.C.M.R. 1985); *United States* v. *Seivers*, 9 M.J. 612, 615 (A.C.M.R.), petition granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd, 9 M.J. 397 (C.M.A. 1980); *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition denied, 8 M.J. 242 (C.M.A. 1980). These rulings are consistent with the decision of the only federal court of appeals to consider the issue in light of this Court's decision in *Burch* v. *Louisiana*, *supra*. See *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

2. In addition, the decision below is correct regardless of whether petitioner's claim is examined in light of the historical guarantee of a right to a jury trial or the right to due process.

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members. Thus, it is not known whether petitioner was convicted by a unanimous vote of the panel.

[5] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Delacruz* v. *United States*, cert. denied, No. 86-1675 (May 18, 1987); *Dodson* v. *United States*, cert. denied, No. 86-407 (Dec. 8, 1986); *Garwood* v. *United States*, cert. denied, No. 85-175 (Dec. 2, 1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

a. Petitioner seeks to impose on courts-martial the same requirements that the Sixth Amendment demands of trials by jury. It is firmly settled, however, that the right to a jury trial does not apply to court-martial proceedings.[6] The Framers specifically exempted "cases arising in and land or naval forces" from the Fifth Amendment requirement that the defendant be indicted by a grand jury. By so doing, the Framers also "meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). As this Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring

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[6] *E.g.*, *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); see *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (power to provide for trial and punishment of military offenses is independent of the judicial power); see also *Mendrano* v. *Smith*, 797 F.2d at 1544; *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961) (both holding that a service-member is not entitled to a jury trial); see generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Since petitioner had no Article III or Sixth Amendment right to a trial by petit jury, she also had no right under those provisions to a unanimous jury verdict.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14), and "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military" (*Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 12). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the voting procedures for courts-martial is entitled to particular deference, since the practices at issue predate the Constitution and have been carried forward throughout our history. *Solorio* v. *United States*, slip op. 7-11; see also *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) (citations omitted) ("The constitution of courts-martial, like other matters relating to their organization and administration * * * , is a matter appropriate for congressional action."); accord *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985).

Unanimity has never been a feature of court-martial proceedings.[7] The nation's first military law,

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[7] The origins and development of the court-martial system are distinct from the birth of the jury trial. The British courts-martial are believed to have developed from the courts of chivalry, which were separate from the common law

the Articles of War of 1776, like their predecessor, the British Articles of War,[8] required only a simple

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courts. *Ex parte Reed*, 100 U.S. 13, 20-21 (1879); 1 W. Winthrop, *Military Law* 47-49 (1886). Modern British military law stems from the Mutiny Act of 1689, 1 W. & M., ch. 5, *reprinted in* 2 W. Winthrop, *Military Law, supra*, App. 38-60, which, as modified, was in effect at the time of the American Revolution. 1 & 2 W. Winthrop, *Military Law and Precedents* 18-20 (rev. 2d ed. 1920). The first American military code, the Articles of War of 1776, was adopted by the Second Continental Congress when it went about raising an army. That code was adapted from the British Mutiny Act and the Massachusetts Articles of War. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, at 21-22, App. 947-960.

During the 19th and the early part of the 20th centuries, courts-martial were composed of no less than five and no more than 13 members. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, at 159; American Articles of War of 1806, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 981; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 986; American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. The number of members was to be 13 "where the number can be convened without manifest injury to the service." This Court, however, found that that language was merely directory to the officer appointing the Court and that the officer's decision was conclusive. *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827); accord *Bishop* v. *United States*, 197 U.S. 334, 339-340 (1904); *Mullan* v. *United States*, 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided).

[8] The British Mutiny Act and the British Articles of War required the vote of nine of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 921, Art. X; *id.* App. 493, § 15, Art. VII. Neither the Mutiny Act nor the Articles of War specified the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided

majority vote to convict a defendant and a two-thirds majority to sentence him to death. Articles of War of 1776, Art. 5, § 15, *reprinted in* 5. J. Continental Cong. 800-801 (W. Ford ed. 1906);[9] see Act of Mar. 2, 1799, ch. 24, 1 Stat. 709 (An Act for the Government of the Navy); Act of Apr. 23, 1800, ch. 33, 2 Stat. 45 (An Act for Better Government of the Navy)[10]; A. Macomb, *A Treatise on Martial Law, and Courts-Martial* 144 (1809); 1 & 2 W. Winthrop, *Military Law and Precedents* 534 (rev. 2d ed. 1920); *id.* App. 972; see also American Articles of War of 1806, ch. 20, 2 Stat. 359. Throughout the 19th century, a majority vote was sufficient to convict a defendant of a non-capital crime and a two-thirds majority was sufficient for a capital offense. 1 & 2 W. Winthrop, *Military Law*

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that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 943, § 15, Art. 12; see R. Scott, *The Military Law of England* 131 (1810).

[9] The Article provided: "All persons who give evidence before a general court-martial, are to be examined upon oath; and no sentence of death shall be given against any offender by any general court-marital, unless two-thirds of the [members] shall concur therein." Similar numerical requirements were reflected in the American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 984, and in the American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 994.

[10] During the Revolution, the Continental Congress adapted the British naval regulations for use by the Continental Navy. Those regulations provided for courts-martial similar to the general courts-martial under the Articles of War, and they required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 n.102.

and Precedents, supra, at 377; compare American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, with American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 994.

In the early 20th century, Congress modified the voting requirements for Army courts-martial. The Articles of War were amended in 1916 to require a two-thirds vote of the panel members to convict a defendant of an offense with a mandatory death penalty. American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. In 1920, Congress again revised the voting requirements. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795. The 1920 amendment required a unanimous verdict to convict a defendant in the Army when the death penalty was mandatory. For all other crimes, conviction required a two-thirds majority. By contrast, the voting requirements in Navy courts-martial were left untouched by the 1920 amendments. As a result, only a simple majority was necessary to convict a sailor and a two-thirds majority to impose the death penalty. See H.R. Rep. 491, 81st Cong., 1st Sess. 26, 49, 74 (1949).

Following World War II, Congress reconsidered the Articles of War and replaced them with the Uniform Code of Military Justice. During hearings on the UCMJ, Congress heard testimony in favor of extending the unanimity requirement to sentences of life imprisonment as well as capital crimes.[11] Article 52 of the UCMJ, 10 U.S.C. 852, was nevertheless adopted in substantially its present form. Congress has modified the UCMJ on 24 occa-

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[11] *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 565, 1081-1082 (1949).

sions since Article 52 was enacted, but Congress has never seen fit to change Article 52. History therefore leads inexorably to the conclusion that the two-thirds majority vote requirement in Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), represents Congress's settled and considered judgment on the balance to be struck between the rights of the individual and the special requirements of the armed forces.

That judgment is reasonable. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to try cases, "the basic fighting purpose of armies is not served" (*ibid.*). Congress determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement was too high a price to pay in terms of lost military preparedness. Congress therefore provided for only one trial of a defendant, at which a two-thirds majority vote would decide the outcome. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the majority vote requirement. *Mendrano* v. *Smith*, 797 F.2d at 1546. Petitioner has not made the "extraordinarily weighty" showing necessary to overcome this long-standing congressional judgment. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).[12]

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[12] This Court has consistently noted that servicemembers do not enjoy some of the rights that the Constitution guarantees in civilian criminal proceedings. See *Middendorf* v. *Henry*, *supra*; *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *Gosa* v. *Mayden*, 413 U.S. 665, 672-678 (1973) (plurality opinion). At the same time, it is important to note that, although Congress has not granted the military defendant a

c. The lead opinion in *Ballew* v. *Georgia*, 435 U.S. 223, 231-243 (1978) (opinion of Blackmun, J.), relied heavily on empirical studies of the group dynamics of civilian juries. Much the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. No comparable studies, however, address the dynamics of courts-martial panels.[13] In light of the functional and compositional differ-

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right to trial by jury, Congress has established independent safeguards against unjustified convictions. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. IV) 834(a). The court of military review may not affirm findings of guilt unless it is independently convinced of the defendant's guilt beyond a reasonable doubt, Art. 66(c), UCMJ, 10 U.S.C. 866(c), and the accused may seek review of that decision by the Court of Military Appeals, a panel of three civilian judges, Art. 67, UCMJ, 10 U.S.C. (& Supp. IV) 867. See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

[13] Petitioner relies (Pet. 9-10) on the opinion of Professor Saks (Pet. App. 4a-7a) that conclusions drawn from studies of civilian juries should be applicable to court-martial panels. But Professor Saks admits (*id.* at 5a, 7a) that he knows of no comparable studies involving military populations. More importantly, Professor Saks admits that he is unfamiliar with the procedures used in courts-martial (*id.* at 5a). He is therefore unable to address any effects that may result from dissimilarities between courts-martial and jury trials.

ences between civilian juries and courts-martial panels, the studies on which *Burch* and *Ballew* relied are not immediately applicable to the military setting. *United States* v. *Guilford*, 8 M.J. at 601-602.[14] Given the special deference due to Congress's judgments in this area and its superior factfinding capabilities, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress.

Finally, petitioner argues (Pet. 6-8) that Congress's recent amendments to the UCMJ demonstrate Congress's intent to conform military to civilian procedures whenever doing so would not disrupt the military's mission. That argument, however, over-

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[14] In *Burch*, the Court concluded that juries must be "a sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross-section of the community would be represented." 441 U.S. at 135. The latter goal, however, is inapplicable to trials by courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of a court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel-members. Art. 25, UCMJ, 10 U.S.C. (& Supp. IV) 825. The members composing a court-martial are drawn exclusively from the same profession as the defendant and they have a specialized knowledge of its working. The failure randomly to select a court-martial panel from a pool containing all servicemen, including enlisted personnel with the same rank as the defendant, is not unconstitutional. *DeWar* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d at 1544-1547.

looks the fact that Congress has refused to adopt a unanimity requirement for courts-martial or to impose any other Sixth Amendment requirements upon the military justice system. Had Congress intended the result petitioner seeks, Congress could easily have amended Article 52, UCMJ, 10 U.S.C. 852, to achieve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 60035